IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

STATE OF FLORIDA,

Appellant,

v. Case No. 5D20-2017

CHRISTOPHER STEPHEN KEMP,

Appellee.

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Opinion filed March 12, 2021

Appeal from the Circuit Court
for Orange County,
Renee A. Roche, Judge.

Ashley Moody, Attorney General, Tallahassee, and Richard Alexander Pallas, Jr., Assistant Attorney General, Daytona Beach, for Appellant.

Oscar Hardin Eaton, Jr., of the Office of Criminal Conflict and Civil Regional Counsel, Casselberry, for Appellee.

PER CURIAM.

The State of Florida appeals the order of the postconviction court vacating Christopher Stephen Kemp's ("Defendant's") second judgment and resultant shortened prison sentence, reinstating his originally-imposed judgment and sentence as well as his previously-pending Florida Rule of Criminal Procedure 3.850 motion for postconviction relief directed to his original judgment and sentence, and rescheduling a hearing on this motion.

Based upon our review of the record, we first conclude that the order being appealed by the State is not one of the orders set forth in section 924.07, Florida Statutes (2020), that the Florida Legislature has authorized the State to appeal. *See Exposito v. State*, 891 So. 2d 525, 528 (Fla. 2004) ("The State's right to appeal in a criminal case must be 'expressly conferred by statute.'" (quoting *Ramos v. State*, 505 So. 2d 418, 421 (Fla. 1987))); *see also State v. Gaines*, 770 So. 2d 1221, 1227 n.8 (Fla. 2000) (recognizing that "the State's right to appeal an adverse ruling is a limited one that is strictly governed by statute" (citing *State v. Creighton*, 469 So. 2d 735, 740 (Fla. 1985))); *State v. Jones*, 488 So. 2d 527, 528 (Fla. 1986) ("[S]tatutes which afford the government the right to appeal in criminal cases should be construed narrowly." (citing *Carroll v. United States*, 354 U.S. 394, 400 (1957))). Nor, for that matter, is the subject order one of the orders

delineated in Florida Rule of Appellate Procedure 9.140(c)(1) that the State may appeal.

Apparently anticipating this court's jurisdictional question of the State's right or authority to appeal this order,[1] the State alternatively requests that we treat its appeal as a petition for writ of certiorari. *See* Fla. R. App. P. 9.040(c) ("If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy."); *State v. Wright*, 172 So. 3d 982, 982 (Fla. 5th DCA 2015) ("Because the order is not one of the authorized appeals under Florida Rule of Appellate Procedure 9.140(c)(1), we exercise our authority to treat the State's notice of appeal and briefs as being a petition for a writ of certiorari.").

To be entitled to certiorari relief, the State here must demonstrate that the order constitutes: "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal." *Reeves v. Fleetwood Homes*

[1] Defendant has not raised the question of this court's jurisdiction over this appeal. Nevertheless, "[c]ourts are bound to take notice of the limits of their authority and if want of jurisdiction appears at any stage of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order." *Polk Cnty. v. Sofka*, 702 So. 2d 1243, 1245 (Fla. 1997) (alteration in original) (quoting *W. 132 Feet v. City of Orlando*, 86 So. 197, 198–99 (Fla. 1920)).

of Fla., Inc., 889 So. 2d 812, 822 (Fla. 2004) (quoting *Bd. of Regents v. Snyder*, 826 So. 2d 382, 387 (Fla. 2d DCA 2002)). "The last two elements, often referred to as 'irreparable harm,' are jurisdictional. If a petition fails to make a threshold showing of irreparable harm, this Court will dismiss the petition." *Coral Gables Chiropractic PLLC v. United Auto. Ins.*, 199 So. 3d 292, 294 (Fla. 3d DCA 2016) (quoting *Nucci v. Target Corp.*, 162 So. 3d 146, 151 (Fla. 4th DCA 2015)); *see also State v. Lozano*, 616 So. 2d 73, 75 (Fla. 1st DCA 1993) (noting that "[t]he 'irreparable injury' test must be satisfied in a certiorari proceeding that arises from a criminal case, as well").

Concluding that there has been no showing of irreparable harm, we decline the State's request for the issuance of a writ of certiorari. The order under review provides the parties with the means for Defendant to receive a reduced prison sentence at the rescheduled hearing in the rule 3.850 proceeding, if that remains their intent.[2]

[2] As the prior postconviction court correctly observed during the first hearing on Defendant's timely-filed rule 3.850 motion, in order for it to have jurisdiction to vacate Defendant's original sentence which, at the time, had been final for more than two years, it would first have to grant Defendant's motion for postconviction relief and vacate Defendant's original judgment and sentence. Upon doing so, the court could thereafter enter a second judgment and sentence, consistent with the parties' negotiated plea agreement presented at the hearing.

At this first hearing, the prosecutor, who expressed his willingness to the court to vacate Defendant's original sentence, would not agree to the "merits" of Defendant's rule 3.850 motion. It is unclear from our record why

APPEAL DISMISSED.

COHEN, LAMBERT, and EDWARDS, JJ., concur.

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this was significant to the prosecutor. Under the circumstances and chronology of this case, granting Defendant's timely rule 3.850 motion for postconviction relief was the only jurisdictional mechanism available for the court and the parties to achieve the intended result of a reduction in Defendant's sentence. Had the prosecutor simply stipulated to the court granting this motion as initially suggested by the postconviction court, instead of persuading the court otherwise, this appeal could have been avoided.